

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 MARSHALL DIVISION

4 LASERDYNAMICS, INC.) (
5) (CIVIL DOCKET NO.
6) (2:06-CV-348-TJW-CE
7 VS.) (MARSHALL, TEXAS
8) (
9 QUANTA STORAGE AMERICA,) (JUNE 15, 2009
10 INC., ET AL.) (9:00 A.M.

11 PRE-TRIAL CONFERENCE
12 BEFORE THE HONORABLE JUDGE CHAD EVERINGHAM
13 UNITED STATES MAGISTRATE JUDGE
14

15 APPEARANCES:

16
17 FOR THE PLAINTIFF: (See Attorney Sign-In Sheet)

18
19 FOR THE DEFENDANT: (See Attorney Sign-In Sheet)

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23
24
25 (Proceedings recorded by mechanical stenography,

transcript produced on a CAT system.)

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1 COURT SECURITY OFFICER: All rise.

2 THE COURT: Please be seated. We've got a
3 hearing on the pre-admission of exhibits and addressing
4 objections to deposition designations today in
5 LaserDynamics against Quanta. It's case 2:06-CV-348.

6 Who's here for the plaintiffs?

7 MR. SANKEY: Your Honor, Tom Sankey, along
8 with Jeff Pollack and Jeff Rabin on behalf of the
9 plaintiffs.

10 THE COURT: All right. For the defendant?

11 MR. WILCOX: Morning, Your Honor. Melvin
12 Wilcox on behalf of the defendants, and I have Mr. John
13 Parker, Mr. Christian Platt, and Ms. Kathy Murray.

14 THE COURT: All right. Are y'all ready to
15 go?

16 MR. WILCOX: We're ready, Your Honor.

17 THE COURT: Okay. I appreciate the
18 agreements. I've been furnished with a letter, I think
19 it's from Mr. Pollack. It sort of outlines the
20 remaining disputes. So let's -- here's how I'd like to
21 proceed. I'd like to first address the plaintiff's
22 exhibits and move to the defendant's exhibits and then
23 go back to the plaintiff's deposition designations and
24 then go into the defendant's deposition designations.
25 Depending on how many disputes there are, I may table

1 those, the objections to deposition -- depositions and
2 just review the transcripts and give you a ruling, you
3 know, before you roll out for trial with enough time to
4 let you make your cuts and all that.

5 I understand there are three or four motions
6 that y'all wanted to take up, as well, but I'll take --
7 I'll do those today also before we leave, to the extent
8 I can. There may be some responses outstanding, but
9 we'll at least put a time table in place to get that
10 stuff briefed up and ruled on again before y'all roll
11 out for trial.

12 Mr. Sankey, do you have a list of exhibits
13 that you wish to offer to which there's no objection at
14 this time, or do you want to --

15 MR. SANKEY: Your Honor, my understanding is
16 that everything that was contained in the letter on
17 Friday is still being objected to.

18 THE COURT: Okay. Well, my question is do
19 you -- do you have a list of exhibits that you want to
20 offer that there aren't any objection to, and if you
21 don't, it's okay. I mean, it's -- I just -- I want to
22 put a procedure in place where we can craft such a list
23 once we're done here today and make sure that I sign an
24 order or Judge Ward signs an order that admits
25 everything to which there's been no objection, admits

1 things over objections that have been made, or refuses
2 to admit based on -- based on an objection being
3 sustained, so --

4 MR. SANKEY: Understood. We can get a list
5 to the Court within a day or so.

6 THE COURT: Okay. Okay. That's -- that's
7 fine. I'm not -- all right.

8 Then let's start, then, with the first one,
9 as I understand it, is -- well, it's Quanta's objections
10 to some of your exhibits. The first category, documents
11 produced by or relating to ASUS or Asustek.

12 Tell me -- I guess tell me what the --
13 what's the objection, first of all? Is it just that
14 they were produced by your co-counsel --

15 MS. MURRAY: Our objection is --

16 THE COURT: -- or your co -- co-defendant?

17 MS. MURRAY: Yes. They relate to a party
18 that's not in this case. It's source code. It's
19 license agreements of ASUS's products, not any of the
20 products of any of the defendants in this case. It's
21 license agreements entered into between ASUS and third
22 parties, nothing to do with any of the Quanta entities.
23 So we don't see why they should stay in this case.

24 THE COURT: Okay. Tell me what the
25 relevancy is, Mr. Sankey. License agreements, I assume

1 you want to show what the custom is in the industry?

2 MR. SANKEY: Correct.

3 THE COURT: Okay.

4 MR. SANKEY: And our damage expert has
5 relied --

6 THE COURT: Relied, okay.

7 MR. SANKEY: They are in his report.

8 THE COURT: Source code, however, for
9 products, are you -- are they still in --

10 MR. SANKEY: Yes. And if I could explain, I
11 think that this is actually kind of a second bite at a
12 motion to strike our technical expert.

13 THE COURT: Okay.

14 MR. SANKEY: At the time that our original
15 expert reports were due, as the Court's aware, we had
16 much better technical information from the ASUS
17 defendants than we did from the Quanta defendants. They
18 have the same controller. One -- there's a Philips
19 controller in one set of theirs.

20 THE COURT: Right.

21 MR. SANKEY: And then there's Mediatek in
22 the other. He used ASUS as an exemplar product, their
23 source code, their specifications. It's throughout his
24 report. It's in all of his exhibits. They have cross
25 examined him on it. And so, basically, this would be,

1 as I've said, I think a second bite at --

2 THE COURT: And he's going to testify that
3 the controllers that are in the accused products operate
4 the same way as the exemplar?

5 MR. SANKEY: Exactly.

6 THE COURT: Okay. All right. Based --
7 based on that representation, I'll overrule the
8 objection to the source code. I overrule the objections
9 to the license agreements. I think they go to what the
10 custom is in the industry, okay? Your point's
11 preserved, though. Just incorporate it into an --

12 MS. MURRAY: And for the record, Your Honor,
13 I mean, they had our source code for a year before those
14 reports were due.

15 THE COURT: Okay.

16 MS. MURRAY: And all the same information on
17 our technical products.

18 THE COURT: Okay. All right. Thank you.

19 Next category is demonstrative of a product
20 that's not at issue in the case. Same type of
21 objection?

22 MS. MURRAY: Yes, Your Honor. This product
23 isn't accused, and they've haven't shown how it's
24 compared to any of our products.

25 THE COURT: Okay. What's the representation

1 as to how it's going to be --

2 MR. SANKEY: The representation is BenQ uses
3 the other controller. There's two controllers. ASUS
4 has one controller, BenQ has the other, and so, again,
5 an exemplar used by the expert in his report.

6 THE COURT: Okay.

7 MS. MURRAY: Our products are not BenQ's
8 product. They haven't analyzed the Quanta product.

9 THE COURT: Okay.

10 MS. MURRAY: This is a BenQ product.

11 MR. SANKEY: It is the exact same as the
12 ASUS. You've got ASUS that has the Philips controller.
13 You've got BenQ that has the Mediatek controller. In
14 his initial report, he says these are my -- going to be
15 my two exemplars that I go off of that operate the same
16 as the defendant's products.

17 THE COURT: Okay. All right. Well --

18 MR. PLATT: Your Honor, if I could just
19 interject one point, and that's with respect to the BenQ
20 drive. We don't have the source code that was used for
21 that BenQ drive. They got that in another litigation.
22 Their expert looked at it and analyzed it. We've never
23 had the opportunity to look at it or analyze it or see
24 whether our products are comparable to that.

25 THE COURT: Did y'all go to BenQ and try to

1 get it?

2 MR. PLATT: No, we asked for them for it --

3 THE COURT: Okay. Well --

4 MR. PLATT: -- since they were the ones that
5 were relying on it.

6 THE COURT: Okay. Well, I'm going to
7 overrule the objections.

8 All right. Third party hearsay documents,
9 130 and 131.

10 MS. MURRAY: Your Honor, these are two data
11 sheets. They appear to be Sony data sheets. There's no
12 data on them anywhere. We don't know where they came
13 from, and we don't believe they're -- they're
14 admissible.

15 THE COURT: Who's going to authenticate
16 these, and what are they, frankly?

17 MR. SANKEY: Your Honor, in Dr. Howe's
18 expert report, he refers to these two Sony data sheets
19 as what was known to one skilled in the art in at least
20 1995. He specifically cited two patent appli -- patents
21 and patent applications wherein these Sony data sheets
22 were contained and listed as prior art. So he's showing
23 what one in at least 1995 knew with respect to
24 enablement and with respect to what was out there in
25 prior art. It's throughout his report. They cross

1 examined him on it in his deposition.

2 MS. MURRAY: The problem, Your Honor, is
3 that these data sheets don't say the day that they were
4 printed. We don't know if this is -- these were in
5 existence in 1999 -- '95.

6 MR. SANKEY: Well, we know that from the
7 patent applications that he specifically referred to in
8 his report that cite these data sheets.

9 THE COURT: Well, how do they -- how do the
10 applications and the patents, how do they cite them? Is
11 it by the number up top, it's CXD2545Q, or --

12 MR. SANKEY: Your Honor, I do not know how
13 they're specifically cited. I -- I do understand that
14 with respect to the date, which was the only outstanding
15 issue, that he was able to show the date of these data
16 sheets because of the date on the patent applications
17 that were cited in his report, that someone had these
18 data sheets from Sony at least as early as 1995 which
19 were the patent applications that were cited in his
20 report.

21 THE COURT: Okay. I'm going to carry these,
22 Mr. Sankey. I need you to give me the patent
23 applications that cite them, and I want to -- I want to
24 look at whether there's sufficient evidence in the
25 record that would suggest that these are the data sheets

1 that are cited in the application, therefore must have
2 been in existence at least as of the time frame you've
3 identified, okay?

4 MR. SANKEY: Yes, sir.

5 THE COURT: All right. Unrelated QSI patent
6 application, 876. What's the relevance of 876?

7 MR. SANKEY: Your Honor, with -- this is a
8 patent application filed by Quanta on very similar
9 technology. It contains a statement by a party opponent
10 specifically stating that -- that this technology is
11 essential equipment for the personal computers.

12 As the Court may or may not recall, at least
13 during voir dire, the panel was told by the defendants
14 that this should be a low damage case because this is
15 now obsolete technology and that this is not a patent
16 that is essential to the use of computers or -- or
17 optical disk drives.

18 Here's their own statement in their own
19 patent application where they're saying that it is.
20 It's a statement by a party opponent.

21 THE COURT: And is it -- is it in general
22 the application itself, or is it -- tell me --

23 MS. MURRAY: Your Honor, this patent
24 application went abandoned. It was actually never at
25 issue.

1 MR. SANKEY: My understanding, it is a copy
2 of the application itself filed obviously on behalf of
3 Quanta to the PTO.

4 THE COURT: Yeah, I don't -- I don't I think
5 the fact that it's abandoned makes it less of a
6 statement of a party opponent.

7 Is there a particular position in here,
8 Mr. Sankey, that you're focusing in on, or is it the
9 entire --

10 MR. SANKEY: There is a portion, and I
11 believe we can get a copy of that and point it out to
12 the Court, but it is in, I believe, their specifications
13 where they talk about -- and the quote they have here in
14 my notes is they say, Furthermore, an optical disk drive
15 capable of reading CD and DVD becomes one of the
16 essential equipments of a personal computer, a
17 one-sentence quote from their specification. It's a
18 description of the related art, also.

19 MR. RAMBIN: I think it's -- do I need to
20 push the button up here, or do I just need to put it on
21 the screen?

22 THE COURT: Well, it's -- if you've got a --
23 just column and line is fine if you've got the --

24 MR. RAMBIN: Okay. Your Honor, it's going
25 to be on the second page of the patent under actually --

1 Paragraph No. 0005.

2 THE COURT: I got it. Okay. Well, I
3 overrule the objection. I think it's got some
4 relevance. I don't know if you want to bring out on
5 cross examination the patent is abandoned or that you
6 don't think that the ability to discriminate between
7 DVDs and CDs, essentially, you can do that. The
8 objection is overruled.

9 Okay. That takes us, then, to -- other than
10 the two that I've carried, I've resolved those
11 objections, and that takes me to y'all's exhibits.

12 MS. MURRAY: Actually, Your Honor, there's
13 four more under third-party hearsay documents.

14 THE COURT: Oh, okay. Okay. Well, I'm
15 sorry. Market analysis of income statement. How come
16 they're not 803.17 issues?

17 MS. MURRAY: Your Honor, we don't -- we
18 don't -- we don't know how these can be authenticated is
19 the problem. These were third party reports about
20 different companies. They're not reports generated by
21 Quanta. Quanta can't authenticate the information or
22 know whether the information contained inside is
23 reliable.

24 THE COURT: Okay. Where do they -- where
25 did they come from?

1 MS. MURRAY: They were produced by Quanta.

2 THE COURT: I mean, but from what firm?

3 MR. POLLACK: Your Honor, the firm is known
4 as TSR, which I believe stands for Techno Systems, and
5 I'm stretching for the R.

6 MS. MURRAY: Research.

7 MR. POLLACK: Research. It's a reputable
8 organization in the industry. As counsel testified, it
9 was within Quanta's files, relied upon by Quanta. Our
10 expert, Mr. Davis, relies upon these reports in his
11 report.

12 THE COURT: Okay. Well, here's what I'll
13 do, the authenticity objection, I'll carry that. I'll
14 grant you leave. I'm extending the discovery cutoff for
15 the limited purpose of allowing you to go and take a
16 record's custodian deposition to assess whether or not
17 these documents are authentic, okay, but I'll carry the
18 authenticity objection. Y'all have got seven days to
19 take that deposition, and if I don't hear back from you,
20 then I'll assume that you've elected not to take the
21 deposition and then I'll take up the authenticity
22 objections at that time. Y'all can do it by telephone,
23 as well.

24 MS. MURRAY: Your Honor, the problem is the
25 company is in Japan, so it might be difficult for us to

1 be able to take the deposition with the rules in Japan
2 for depositions.

3 THE COURT: Okay. Well, that's -- I'll --
4 that's the order of the Court. I'm allowing you leave
5 to the extent you can do it, and if you can't do it
6 because you're -- because you can't do it in compliance
7 with what the Japanese law is, then y'all let me know
8 that and I'll take up the authenticity objections at
9 that time, okay?

10 MS. MURRAY: We'll let you know.

11 THE COURT: Okay. 881 and 882, are these
12 also --

13 MS. MURRAY: These are third-party summaries
14 of income statements. 881 doesn't have even the correct
15 name of a company for Quanta Storage on it, so we're
16 concerned about the reliability of these documents and
17 the information in them.

18 We did provide to plaintiff actual copies of
19 Quanta Storage and Quanta Computers' income statements,
20 so they -- and those are marked as exhibits, so they can
21 use those, which we don't have a problem with. We just
22 have a problem with them using a third-party report of
23 Quanta's income statements which may not be as accurate
24 as Quanta's own income statements.

25 THE COURT: And which portions are not

1 accurate?

2 MS. MURRAY: Well, the name of the company
3 is not accurate.

4 THE COURT: Okay.

5 MS. MURRAY: We haven't had a chance to
6 verify all of the figures in here because it's just a
7 summary for each year.

8 THE COURT: Well, who -- I mean, do we know
9 who did the summary?

10 MR. SANKEY: Your Honor, if I could, and
11 I'll let Mr. Pollack speak to this, my understanding of
12 this is this is a company that simply takes Quanta's own
13 financial statements and converts them from Taiwanese
14 dollars to U.S. dollars. We've got a chart showing that
15 the conversion, based upon what the exchange rate was at
16 the time, is exactly as stated in Quanta's own financial
17 statements. If you want to show that to --

18 THE COURT: Has that been provided to the
19 other side?

20 MR. POLLACK: Your Honor, I just took the
21 comparison over the weekend. It has been provided, but
22 if you look at the report, and I have 882 in front of me
23 now, you'll see that there's a conversion rate there for
24 each of the years 2007, 2006. For 2007, it's 32.848802
25 in Taiwanese dollars to U.S. dollars.

1 And if you were to take that number and put
2 up against Quanta's own spread -- income statements and
3 convert that into U.S. dollars and also account for the
4 fact that I believe Quanta's reports are this thousands
5 and -- and the one source is reported in millions, you
6 come out with exactly the same numbers.

7 THE COURT: Where is one source located?

8 MR. POLLACK: Where are they physically
9 located? I don't know the answer to that, Your Honor.
10 These are documents that our experts relied upon.

11 THE COURT: My -- well, are they located in
12 a place where if I give y'all the same ruling and let
13 you go take their deposition, it's a feasible ruling or
14 is it -- I mean --

15 MR. POLLACK: Again, I'm sorry, Your Honor,
16 I don't know where they are, but if we're ordered to
17 take their deposition, we will.

18 THE COURT: Well --

19 MR. SANKEY: And if I could briefly, Your
20 Honor, what I understand our use of these was is for our
21 damages expert, instead of going to July of 2006 and
22 finding out the exchange rate and doing it, he relied
23 upon this as a -- you know, this is a company that does
24 this with people's financial reports, and so he
25 basically --

1 THE COURT: He can rely on it. I don't have
2 a problem with him relying on it. It just doesn't make
3 it admissible as an exhibit. That's my point, and I
4 think that's her point, as well.

5 MR. POLLACK: Your Honor, it may be
6 admissible as a summary under rule 1006, as well.

7 THE COURT: Well, it may be admissible as a
8 summary if it's been properly authenticated, but, I
9 mean, her point is is that, you know, they've got the
10 name wrong -- the first thing that they've got wrong is
11 the name of the company that they're providing a summary
12 for, so --

13 MR. POLLACK: I can't -- I can't dispute
14 that, Your Honor.

15 THE COURT: Okay. Here's what you need to
16 do, I'm not pre-admitting it, okay, and I'm not
17 pre-admitting the ones from the other company. I'm
18 carrying those objections. I'm going to allow seven
19 days. If you can take a deposition, get them
20 authenticated, let me know within a week of what you --
21 what you can do. You need to consult with your experts
22 about where they gathered the information. I mean,
23 these depositions are limited to authentication issues.

24 MR. POLLACK: Okay.

25 THE COURT: 900 series, all right?

1 MR. POLLACK: Thank you, Your Honor.

2 THE COURT: Okay. Does that resolve all of
3 the issues related to y'all's objections to their
4 exhibits?

5 MS. MURRAY: Yes, sir. Yes, Your Honor.

6 THE COURT: Okay. All right. Okay. Let's
7 go to y'all's exhibits, and I'm referring to Quanta
8 defendant's exhibits.

9 No. 2, I assume y'all want that -- the BenQ
10 license on the issue of your exhaustion defense?

11 MS. MURRAY: Yes, Your Honor.

12 THE COURT: All right. Redact the
13 consideration paid. I'll admit it for that limited
14 purpose, to the extent it's even going to be a jury
15 issue.

16 MR. SANKEY: One, I don't think that it
17 would be, but the reason why we maintain our objection
18 to this is that there are no longer any
19 BenQ-manufactured products at issue in the case, and so
20 I think that it would just be more prejudicial --

21 THE COURT: Is there a willfulness claim?

22 MR. SANKEY: There is a willfulness claim.

23 THE COURT: It may have some relevance as to
24 whether or not they believe they're willfully infringing
25 if they were relying on a license defense, so beyond --

1 well, with respect to the BenQ drives that are no longer
2 in the case --

3 MS. MURRAY: Your Honor, that's the first
4 we've heard that they're no longer in the case, which is
5 why we've had to keep this document on our exhibit list.

6 THE COURT: Do you still want it there if
7 they're no longer in the case?

8 MS. MURRAY: If they -- no, we don't need
9 them.

10 THE COURT: Okay. All right.

11 MS. MURRAY: We were using it to show that
12 the products were licensed.

13 THE COURT: Well, I assume that's why that
14 y'all -- y'all wanted it in.

15 MS. MURRAY: Yeah, if they're saying these
16 aren't in, then --

17 THE COURT: Okay. Well, I tell you what,
18 I'm not going to pre-admit No. 2. If something happens
19 at trial and it may come back into the case, then leave
20 is granted to approach Judge Ward and -- and get it
21 pre-admitted at that -- or get it admitted at that time,
22 okay?

23 MS. MURRAY: Okay. Thank you, Your Honor.

24 THE COURT: No. 5 -- or, actually, there are
25 news articles and other hearsay documents in the next

1 category. Exhibit 3 and 525.

2 MS. MURRAY: Your Honor, Exhibit 3 is an
3 article written by one of our experts. We've agreed to
4 limit this document to impeachment only.

5 THE COURT: Okay. It's not -- what is -- so
6 you're not seeking pre-admission of -- of Exhibit 3?

7 MS. MURRAY: No.

8 THE COURT: Okay. It will be limited to
9 impeachment only, then?

10 MS. MURRAY: Yes.

11 THE COURT: All right. Well, then, I'll
12 overrule the objection to that. And 525?

13 MS. MURRAY: The same thing, Your Honor.
14 We're just limiting that to impeachment only.

15 THE COURT: All right.

16 MR. SANKEY: Your Honor, if I could, with
17 respect to 525, my understanding is this is an exhibit
18 that was attached to their claim construction briefing
19 where they were seeking a specific definition of the
20 word standard. The Court obviously didn't accept this,
21 and so I'm not sure of the relevance of it, other than
22 to go against the Court's claim construction.

23 THE COURT: Well, they're not allowed to do
24 that, but I'm not going to make them tell you what their
25 cross examination is, Mr. Sankey. They're going to

1 limit its use for impeachment. With that, I'm not
2 pre-admitting it, and I'm overruling the objections. If
3 they try to run counter to the claim construction ruling
4 at trial, then you need to object at the time.

5 Third-party websites, 459, 460, and 467.

6 MS. MURRAY: Two of these, Your Honor, are
7 the subject our request for judicial notice. We're
8 basically -- we're using these documents to show that
9 Sony and NEC Optiarc was owned -- previously owned by
10 Sony and NEC just for that proposition, because Sony and
11 NEC both have a license to the patent, and our position
12 is, therefore, products made by Optiarc also have a
13 license.

14 Plaintiff is contesting that, so we've had
15 to put in evidence of just -- just the composition of
16 Optiarc.

17 THE COURT: What's the objection to
18 third-party websites?

19 MR. SANKEY: Your Honor, first of all, and
20 I'll let to Mr. Pollack talk to the law on it, but it's
21 clearly hearsay because they're using them to assert the
22 truth of the matter that's contained in there, and
23 that's a specific ownership interest at a specific date.

24 A couple of things about it, first of all, I
25 think these exhibits, the four exhibits of these

1 websites, are inadmissible hearsay, but then take it
2 further to their motion for the Court to take judicial
3 notice of it, they want to take hearsay and not only
4 have it admissible at the trial but have the Court tell
5 the jury that I'm accepting this, taking judicial notice
6 of it, this is a fact. They're taking something that's
7 inadmissible and giving it even higher credibility than
8 all the other evidence in the case.

9 But this is a -- this goes towards their
10 license defense that they've had in the case since day
11 one. They know that pursuant to that license defense,
12 that one of the four or five elements they're going to
13 have to show is this specific ownership. They've listed
14 Sony and Philips on their initial disclosures as
15 witnesses that are going to -- they may potentially
16 testify at trial.

17 They know it's a piece of evidence that they
18 need at trial, and now they want the Court just to
19 accept it even though it's hearsay, and there's no way
20 to cross examine the witnesses on the ownership
21 interest, the dates, who was controlling these joint
22 ventures. And so there's issues related to these that
23 clearly would be extremely prejudicial to the plaintiffs
24 for them to come in.

25 MR. PARKER: May I address this briefly,

1 Your Honor?

2 THE COURT: Yes.

3 MR. PARKER: First of all, we believe that
4 the greater weight of authority -- and this gets into --
5 and I was going to address with the Court our motion for
6 judicial notice. We're not asking for any special
7 imprimatur to be placed on these documents. We don't
8 even think we should have to be arguing this.

9 Everybody in this courtroom candidly knows
10 what the ownership of Optiarc was, that it was 55
11 percent Sony and 45 percent NEC. Both Sony's website
12 and NEC's website demonstrate that. There was no
13 motivation in either of these major companies --

14 THE COURT: To misrepresent what the
15 ownership is?

16 MR. PARKER: To misrepresent what the
17 ownership was.

18 THE COURT: You're suggesting they're
19 business records and they ought to come in, right?

20 MR. PARKER: Yes, sir. And beyond that,
21 beyond that, one of the cases they rely on is a Texas
22 case in which the web information was not permitted
23 because the Court said you needed some additional
24 verification. For instance, they suggested it had to do
25 with ownership of a yacht. They suggested, for

1 instance, if you had the Coast Guard license, well, we
2 have precisely that here. We have NEC's SEC filing in
3 which they just as consistently as is set forth on the
4 two websites of the two companies point out that their
5 ownership in this Optiarc joint venture is set out as 55
6 for Sony, 45 for NEC.

7 There's no conceivable reason why NEC would
8 file an official document with the United States
9 government, the SEC, misrepresenting the ownership of
10 this joint venture. And we really shouldn't have to
11 waste our time doing this, but because they wouldn't
12 stipulate and they wouldn't relent on this, more than a
13 week ago, we sent them a letter offering, okay, if
14 you'll agree with us to just ask the Court's permission
15 to take a deposition, we'll go take a deposition of
16 somebody from Sony or NEC for the sole purpose of
17 authenticating this, although we believe it will be a
18 waste of everyone's time to do that, we will do that if
19 you stand on this in light of what we think is an
20 overwhelming basis for admissibility and judicial
21 notice, and they didn't even respond to us.

22 MR. SANKEY: Two comments, Your Honor,
23 number one, Sony's own website has a disclaimer on it
24 that says, Do not accept any of this information as
25 valid after the date that it's posted. And, second,

1 what witness does these -- do these exhibits come in
2 through that we can cross examine on?

3 They simply want to get the exhibit, put it
4 in front of the jury, and argue it in opening and
5 closing without a witness being able to testify to it.
6 I don't know how we rebut it without that witness.

7 MR. PARKER: Sir?

8 THE COURT: Well, hold on.

9 MR. PARKER: I didn't mean to interrupt.

10 THE COURT: It's all right.

11 MR. PARKER: We asked them to give us a
12 basis for their opposing this ownership that is so well
13 known and highly publicized publicly, and they haven't
14 done that.

15 THE COURT: Well --

16 MR. PARKER: And we really are being kind of
17 jerked around here.

18 THE COURT: Well, the purpose for these
19 hearings is to sort of cut through the red tape, as I
20 would call it, and let in documents that everybody knows
21 can be proved up either through authenticity issues or
22 business records issues.

23 On their face, Mr. Sankey, you know, I
24 agree, I mean, these are business records of the
25 company, and I'll -- I'm admitting them as exhibits, and

1 I'm not sure you have to have a sponsoring witness for
2 every exhibit. You know, I know of at least one deed
3 construction case that I was involved in where the
4 entirety of the proof consisted of three certified
5 copies of the deeds and then requested the judge to
6 construe them to see who owned what.

7 So I'm admitting them. I'll give you --
8 I'll give you the opportunity, if you want to, to go and
9 take whatever corporate rep you can find from NEC or
10 Optiarc to verify or to disprove the contents that are
11 contained in the website, but I'm admitting them.

12 I'll -- again, you've got seven days. If
13 you want to go take an authenticity objection, if you
14 think they're misrepresenting to the world and to the
15 SEC the state of ownership of this venture, I'll let you
16 do that, okay?

17 MR. SANKEY: Well, is the Court at least
18 denying the motion to take judicial notice --

19 THE COURT: I'm not ruling on it.

20 MR. SANKEY: And inform the jury that this
21 is, in fact, a fact?

22 THE COURT: I'm not ruling on that right
23 now. I'm admitting these exhibits, okay?

24 MR. SANKEY: Yes, sir.

25 THE COURT: Other hearsay documents, 216,

1 217, 477 (sic), and 421.

2 MS. MURRAY: Your Honor, 216 and 217, which
3 are actually also on the plaintiff's exhibit list, the
4 reason we have these documents, we don't believe --
5 these are basically lists of patents that Quanta
6 Computer has purchased from IBM in connection with a
7 license between Quanta Computer and IBM. We don't think
8 they're relevant to anything.

9 We've agreed to limit them to rebuttal, and
10 the reason why we would just want these, it's for
11 completion sake. If plaintiff is going to offer into
12 testimony or evidence that Quanta paid a certain amount
13 to IBM for patents, we want to show how many patents
14 Quanta purchased from IBM.

15 THE COURT: The entirety of the license of
16 the transaction?

17 MS. MURRAY: Exactly.

18 THE COURT: Right?

19 MS. MURRAY: So that's the only way that
20 these are coming in.

21 THE COURT: Okay. In light of that
22 representation, I'm not going to pre-admit them. I
23 think they do bear on the entirety of the transaction,
24 and I'll grant you leave to approach Judge Ward during
25 the course of the trial if something comes in with

1 respect to the amount of the purchase price to IBM,
2 okay?

3 MS. MURRAY: Okay. Thank you, Your Honor.

4 And 421, in light of their new
5 representation that the BenQ drives are out of the case,
6 we don't need to -- we can remove 421.

7 THE COURT: All right. 421 is withdrawn,
8 and is 777, is that in the same -- that's also the IBM?

9 MS. MURRAY: Yes.

10 THE COURT: It's a technical disclosure.
11 Well, excuse me, no, it's not.

12 MS. MURRAY: That one we've agreed to limit
13 to impeachment.

14 THE COURT: All right. I'm not
15 pre-admitting it, then.

16 MR. SANKEY: Your Honor -- Your Honor, just
17 for the record, with respect to 777, I understand it's
18 not being pre-admitted, but our -- one of our objections
19 to that is that that was not identified on Quanta's --

20 THE COURT: 3-3 disclosures.

21 MR. SANKEY: Yes, sir.

22 THE COURT: Okay. I'm getting ready to
23 address that issue. What -- and here I am going to ask
24 you what -- what you're requesting to use 777 for
25 because it seems to me to be a little unfair to allow

1 you to, quote, use them as impeachment and get before
2 the jury the same thing you wouldn't be allowed to get
3 before them if you hadn't identified it in your
4 contentions.

5 MS. MURRAY: They were identified in our 282
6 disclosures, Your Honor.

7 THE COURT: Well, what are -- what is 777?
8 What are you trying to use it to prove?

9 MS. MURRAY: I believe this one was for
10 state of the art. Your Honor, we can withdraw it.

11 THE COURT: Okay. I'm going to -- I'm not
12 allowing you to use it even for impeachment purposes.
13 You know, 282 disclosure is required by statute, but,
14 you know, the rules here require you to identify things
15 far in excess of what the statutory 30 days is, okay?
16 All right. That's the basis for my disallowing it even
17 for impeachment purposes.

18 953, does it go solely to inequitable
19 conduct?

20 MS. MURRAY: Yes, Your Honor.

21 THE COURT: Okay. Well, the objection is
22 that you didn't allege 953. Is that a -- that's a
23 prior -- it's a different Kamatani patent?

24 MS. MURRAY: It's a different Kamatani
25 patent.

1 THE COURT: Okay.

2 MS. MURRAY: We did allege specificity. We
3 didn't put in every single patent in our answer.

4 THE COURT: Well, Mr. Sankey, I find it hard
5 to believe how prejudiced you are if I just allow it for
6 inequitable conduct purposes and it's your client's own
7 patent. So I'm overruling that objection.

8 Now, y'all want me to sort out the incorrect
9 translation? I'm serious.

10 MR. SANKEY: Well, Your Honor, it's just
11 they gave us a translation that said recorded, and our
12 translator came back and said it's unrecorded. The
13 word --

14 THE COURT: Okay.

15 MR. SANKEY: -- they used, recorded, it
16 should be unrecorded. So it changes it substantially,
17 and we're happy to give them the correct translation.
18 We've asked them to go back and get it re-translated,
19 and they just haven't had time to do that.

20 THE COURT: Okay. Well, tell me this, tell
21 me in the translation, the English version, Mr. Sankey,
22 exactly where the word is that you're talking about.

23 MR. SANKEY: I'm told it is the second page,
24 last paragraph, last sentence that starts "As a result,
25 the type of optical disk that can be determined by

1 detecting the reflectance of the recorded Area B." Our
2 translator says that should be "the unrecorded Area B."

3 THE COURT: And are you on the second page?

4 MR. POLLACK: That's our translation.

5 MR. SANKEY: Let me find it in their
6 translation for the Court.

7 MR. POLLACK: It's on the third page, the
8 second paragraph beneath "an embodiment of the
9 invention," Judge, and it is the last sentence in that
10 paragraph starting "As a result."

11 THE COURT: And it should be "the
12 unrecording Area B"?

13 MR. SANKEY: Correct.

14 THE COURT: Well, the sentence preceding
15 talks about "the recording Area B and a nonrecording
16 Area A."

17 MR. POLLACK: Your Honor, our translation
18 is --

19 THE COURT: Is that one wrong, too?

20 MR. POLLACK: Our translation is consistent
21 with that, Your Honor. The only thing inconsistent with
22 it is the -- our translator has translated the last
23 sentence to be "unrecorded area."

24 THE COURT: Is it a -- is what you're
25 telling me it's a typo in the patent?

1 MR. POLLACK: It may be a typo in the
2 patent, or it may -- that could be -- that could be one
3 of the explanations. I don't know if that's the case.

4 THE COURT: Well, if the nonrecording area
5 is A and the recording area is B, it would need to be a
6 typographical error in the patent.

7 MR. POLLACK: It would seem. Really, what
8 we're saying, Your Honor, is simply that their
9 translation is literally incorrect. Regardless of what
10 reason it was --

11 THE COURT: The reason it's literally
12 incorrect is because there's a typographical error in
13 the patent.

14 MR. POLLACK: There could be a typographical
15 error.

16 THE COURT: I'm not fussing at you. That
17 may be --

18 MR. POLLACK: There could be a typographical
19 error. I'm not saying that that's out of the realm of
20 the possibility, but even if there is --

21 THE COURT: Do you think there's a
22 typographical error?

23 MR. POLLACK: Even if there is a
24 typographical error, the translation should reflect
25 that.

1 THE COURT: Okay.

2 MR. POLLACK: That's the only position we're
3 taking on that.

4 MR. SANKEY: And as I said, I think we
5 brought this up to them last week, and they had
6 commented that their translator had not had an
7 opportunity to go back and check. We're happy to work
8 with them, let them -- their translator do that and see
9 if we can resolve it without the Court having to figure
10 out what translation is correct or whether it's a typo
11 or not.

12 THE COURT: Have y'all had a chance to visit
13 with your translator yet?

14 MS. MURRAY: They just -- we haven't had,
15 Your Honor. They just mentioned this the latter part of
16 last week, but we're happy to go back and --

17 THE COURT: All right.

18 MS. MURRAY: We do want the right
19 translation of the record.

20 THE COURT: Okay. Well...

21 MS. MURRAY: But we don't -- we don't have
22 plaintiff's translation, so --

23 THE COURT: Okay. You might -- can y'all
24 provide a copy of your translation?

25 MR. POLLACK: Yes, Your Honor.

1 THE COURT: Okay. Why don't you give them a
2 copy of your translation, and why don't y'all meet about
3 it? Also meet about whether or not y'all can agree
4 whether it's a typographical error in the patent that
5 the jury ought to be informed or the Judge ought to tell
6 the jury about, okay?

7 MR. SANKEY: Yes, sir.

8 THE COURT: Given that they're working with
9 documents that have been translated. All right. Is
10 there a filing, Mr. Sankey, in the record that reflects
11 the basis for your objections to Quanta's deposition
12 designations, I mean, the ones that are -- that are --
13 have narrowed down here?

14 MR. POLLACK: Yes, Your Honor. We filed our
15 objections to their deposition designations on I believe
16 May 1st.

17 THE COURT: Okay. That's -- whatever these
18 are, they're -- they're a distilled version, rather, of
19 what you already filed?

20 MR. POLLACK: That's correct, Your Honor.

21 THE COURT: Okay. All right.

22 MR. POLLACK: So we haven't -- neither party
23 has gone ahead and amended those. We thought it was
24 easier to put them in a letter.

25 THE COURT: I don't need them amended. I

1 just want to make sure that the record is complete as to
2 what your objections are.

3 Same for the Quanta defendants?

4 MS. MURRAY: Yes, Your Honor.

5 THE COURT: Okay. Well, then I'll -- what
6 I'm going to do is I'll carry it rather than have y'all
7 sit here and watch me read depositions all morning. I
8 know y'all have other things to do. I'll just read
9 those, and I'll get them to you in sufficient time for
10 you to make whatever edits you need to your video or
11 videoclips.

12 MR. POLLACK: Your Honor, if I may.

13 THE COURT: Yes, sir?

14 MR. POLLACK: In our letter, in the first
15 deposition designation for Mr. Kamatani, the references
16 is 3/24/05. The correct designation is the 3/25/05
17 transcript. I understand that Mr. Rambin brought over
18 the correct -- the correct version of that deposition in
19 any event.

20 THE COURT: Okay.

21 MR. POLLACK: Okay.

22 THE COURT: But it is the March 25th, '05?

23 MR. POLLACK: It is.

24 THE COURT: Okay.

25 MR. POLLACK: It is.

1 THE COURT: Okay.

2 MR. POLLACK: And that's reflected in our
3 objections.

4 THE COURT: Okay. Is there any corrections
5 to the objections from the defendants?

6 MS. MURRAY: Your Honor, on the last one for
7 the defendants, the cite here is just the objection to
8 the question, 108, 21 through 25, but our position would
9 be if the question drops out, the answer should also
10 drop out, and the cite for the answer --

11 THE COURT: Would be 109 something?

12 MS. MURRAY: Yes. 109, 1 through 5.

13 THE COURT: All right. I'll take a look at
14 that.

15 Now, then, there's an unopposed motion to
16 appoint interpreters at trial. That's no opposition?

17 MR. SANKEY: No opposition. My
18 understanding is they could not find one that could be
19 available for all the dates, and so we ended up with
20 three that could.

21 THE COURT: Okay. These are the
22 interpreters that will be here with the witnesses. Now,
23 I don't -- y'all may have additional ones that are
24 present at counsel table for purposes of advising, you
25 know, your clients and everything, but the ones -- these

1 are the ones you're talking about that are going to be
2 up here?

3 MR. SANKEY: Correct.

4 THE COURT: Okay. Well, that will be
5 granted.

6 I've got a motion for leave to supplement
7 Mr. Davis -- Davis' opinion. Is this related to the
8 damages documents I just ordered produced?

9 MR. SANKEY: It is, Your Honor.

10 THE COURT: Is that the limita -- is that
11 the extent of his supplementation?

12 MR. SANKEY: That is my understanding.

13 MR. PLATT: Your Honor, we would disagree
14 with that. In the -- in the new charts that they
15 provided, they went through -- and to give you a little
16 background on our sales summaries that were provided.
17 Throughout the course of the litigation back starting in
18 June of 2008, we provided sales summaries that broke
19 down our sales by individual drives, and this is for
20 Quanta Storage, with units and revenues on a quarterly
21 basis. We supplemented that again in January of 2009
22 and supplemented it again updating the figures in April
23 of 2009.

24 Now, in Mr. Davis' original report, he did
25 not include any breakdown of individual drives. He just

1 summed everything up together. Now, in this report,
2 they're going through and sorting out specific drives
3 which they didn't do the first time around.

4 THE COURT: Well, has the overall number
5 increased?

6 MR. PLATT: I don't believe the overall
7 number has increased other than -- and, actually, the
8 estimates -- the data that he used for Quanta Storage
9 went through 2008. Those were the same numbers that
10 they had back in January 2009 with I think some slight
11 modifications that were -- that I think would be --
12 could have been addressed at trial. But the breaking
13 down of the individual drives, that's something entirely
14 new. That was not done before.

15 THE COURT: But y'all had provided numbers
16 to them that break down by drive, right, revenues on per
17 drive basis?

18 MR. PLATT: That's right. And they had not
19 used that -- he had not used that information in his
20 original report.

21 THE COURT: Well, have they dropped out some
22 of the drives that they're accusing?

23 MR. PLATT: I believe they have, Your Honor.

24 THE COURT: So you want me to limit him to a
25 larger number that would be unsupported then by the

1 proof? I mean, is that the reason that you're making
2 the objection?

3 MR. PLATT: Well, I think our objection is
4 that -- that our expert hasn't had a chance to go
5 through and respond to it. I think Mr. Davis' original
6 report wasn't going to be substantiated anyways at trial
7 because of the -- I mean, although they were going to
8 come in with a larger number, I don't think it had any
9 basis because it hadn't gone through and tried to parse
10 out licensed drives from unlicensed drive.

11 THE COURT: That's a different issue,
12 though. I mean, if they're -- I mean, if all they've
13 done is taken the aggregate number that he originally
14 gave you and then broke it down into the per drive basis
15 that y'all also -- and dropped some of those drives out,
16 I'm having a hard time figuring out how you're
17 prejudiced by -- by allowing him to do that.

18 MR. PLATT: I think, Your Honor -- I mean,
19 the prejudice is we haven't -- we didn't know that
20 that's what they were going to put on at trial, and now
21 we're finding that out, that they're going to have their
22 expert go through on a drive-by-drive basis, which
23 that's not what they -- that's not what he was
24 originally going to do.

25 THE COURT: Well, how much -- how much time

1 does your expert need to meet that?

2 MR. PLATT: I haven't talked to the expert
3 about the timing of responding on it, but I would
4 estimate probably a week.

5 THE COURT: All right. Well, he's got a
6 week --

7 MR. PLATT: Okay.

8 THE COURT: -- to meet, okay?

9 MR. PLATT: Thanks, Your Honor.

10 THE COURT: And serve him supplemental
11 reports limited to responding to what you've been
12 furnished here today, okay?

13 MR. PLATT: Thank you, Your Honor.

14 THE COURT: All right. So 485 is granted to
15 that extent with the caveat that I'm going to allow the
16 Quanta defendant's expert to serve a supplemental report
17 that likewise correlates on a drive-by-drive basis the
18 damages figures of the plaintiff's expert.

19 487, what's -- what's Mr. Howe trying to
20 do -- Dr. Howe, excuse me?

21 MR. PARKER: I'm ready to address that, Your
22 Honor.

23 THE COURT: Okay.

24 MR. PARKER: And it addresses -- I think
25 that addresses a larger issue, and we have some

1 demonstratives that we'd like to show to the Court and
2 to the other side including a timeline.

3 The main problem we have with Mr. Howe's new
4 proposed supplemental expert report is for the very
5 first time in this case he has actually identified
6 source code related to Quanta -- Quanta Storage accused
7 devices, the very first time, and he admitted in the
8 deposition that was taken of him last week that he had
9 that information when his deposition was first taken and
10 his report was first issued, and he didn't use it.

11 He concentrated on the ASUS drives, and he
12 prepared similar charts for the ASUS drives but not for
13 the Quanta drives, and he has now done that for the
14 first time in a supplemental report that we received
15 last week, and they now are seeking for the very first
16 time in this case to have a fourth amended set of
17 infringement contentions.

18 Remember, Your Honor at the last hearing
19 granted them the right to submit their third amended
20 infringement contentions. They had had an earlier
21 proposed fourth amended infringement contentions which
22 were never apparently submitted. Now they are
23 submitting what they denominate as their fourth or
24 proposed fourth amended infringement contentions, and,
25 again, for the very first time actually list source code

1 for Quanta Storage accused drives.

2 Now, why is that inappropriate at this point
3 in time in this case?

4 THE COURT: Are the --

5 MR. PARKER: Your Honor, can I show --

6 THE COURT: -- proposed fourth amended, are
7 they here somewhere?

8 MR. PARKER: Yes, sir, and I'm ready to --
9 can I --

10 THE COURT: Yes, sir.

11 MR. PARKER: May I approach and show you
12 something?

13 THE COURT: Yes, of course.

14 MR. PARKER: The first is a timeline. I
15 think I can go through this quite quickly, Your Honor.

16 Now, if -- the first two pages are the
17 timeline. The first page is the true timeline. The
18 second page emphasizes the amount of time that's
19 expired. The third page is -- and there are actually
20 two pages there -- and this is what is in Mr. Howe's
21 supplemental report, and what they also want to place in
22 their fourth amended infringement contentions. This for
23 the first time identifies source code of Quanta Storage
24 accused drives.

25 Now, if you flip to the next pair of pages,

1 it's the same diagram, that is to say it's plaintiff's
2 diagram, but in green, we have highlighted the drives
3 and the source code that were made available to them in
4 September and October of 2007, and there is no dispute
5 about this. Plaintiff's vendor picked up source code
6 and generated the documents labeled QSI, slash, LD,
7 1 through 1535. All of those documents in green, all of
8 that in green they have had since the fall of '07.

9 If you go to the next page --

10 THE COURT: Excuse me, what are QSI/LD 1
11 through 1535?

12 MR. PARKER: Those are -- that is the copy
13 of source code that their technical expert gen -- as I
14 understand, and make sure I'm not misspeaking, their
15 technical expert generated from what we made available
16 to them in Los Angeles. They came and got it, and they
17 got it in a searchable PDF format, which was their
18 choice to do. Remember, Your Honor asked them about
19 that at the last hearing?

20 THE COURT: I understand.

21 MR. PARKER: And I think there might have
22 been some confusion about that at the last hearing
23 because as I recall, Your Honor cited the e-mail that we
24 had sent to them saying, "We have it on a computer. You
25 can come do whatever you want to do with it." This is

1 what they came and did with it at that time. And then
2 they talked about asking for it in a deposition, and I
3 think the implications was that they asked for it in a
4 deposition shortly after the offer was made. But that's
5 not what happened.

6 The offer was made in the fall of '07 by
7 Terry Garnett, one of the partners that has been
8 involved in handling this case. The deposition of our
9 technical -- in-house technical person was taken almost
10 13 months later, and at that time, he made some
11 reference in needing to get to the source code.

12 The deposition was being defended by an
13 associate who is tech -- who is also a technical expert
14 but also happens to speak fluent Mandarin, and that's
15 why he was defending the deposition. Mr. Garnett was
16 not there, and it was this associate some 13 months
17 later that they said, "Don't you have it around here?"
18 And he didn't know anything about that, but he invited
19 them on the record to say, "If you'll straighten this
20 out, if you point it out to me, we'll see what we can do
21 to get it to you."

22 There was never any follow-up on that, that
23 is to say getting to the native source code again until
24 in this Court on the hearing the last time we were here
25 in which the Court said, "Go ahead and make it available

1 to them." And we did. We made it available to them yet
2 again, but it was no different from what was available
3 to them in the fall of '07 and what was offered to them
4 in the fall of '07.

5 Now, if you look at the next pair of
6 experts, Your Honor, or documents, this is again their
7 chart, and what are added are these yellow stars? Now,
8 what do the yellow stars mean? The yellow stars mean
9 that in August of '08, the plaintiff deposed a QSI
10 technical witness on the documents and/or drives, each
11 one of them that has a yellow star by them, and there's
12 no doubt about that. That is absolutely clear in the
13 record.

14 And now we move to the next set, and that's
15 Tab 4, and there you see not only yellow stars but red
16 stars. Now, what does that mean? The green, of course,
17 means it was made available in September and October of
18 '07. The yellow means they deposed our man about it in
19 August of '08. And the red means that in February of
20 '09, we provided narratives with respect to each one of
21 these drives and each one of these source code
22 references.

23 Remember, Your Honor, there was a dispute
24 about whether we ought to have to provide those
25 narratives, and the Court ordered us to do it, and we

1 did it, and the red stars indicate with respect to which
2 of the portions of the matrix provided by them those
3 narratives were given.

4 Now, finally, or moving along, if you look
5 at the next pair of pages, there are a couple of columns
6 that had been in white before and had no designation on
7 them. The reason for that is these were newly-accused
8 drives. They were newly-accused in February of this
9 year. So, of course, we couldn't have given them
10 anything back in '07 or '08 with respect to them. But
11 on March --

12 THE COURT: Well, didn't I -- wasn't there
13 an order signed, though, that allowed them to get
14 discovery of accused drives and products that were like
15 accused drives or operated similarly to those? I mean,
16 I didn't limit discovery at any time in this case to
17 accused drives, did I?

18 MR. PARKER: Not to my knowledge, Your
19 Honor, but you did at some point require them to do this
20 within 30 days of their receipt of the source code that
21 would permit them to do this.

22 THE COURT: Right.

23 MR. PARKER: And we are now months and in
24 some cases years down the road from that.

25 THE COURT: Right.

1 MR. PARKER: And that's what our problem is.

2 THE COURT: Well, I've seen that theme
3 throughout a lot of your filings, but I know that I
4 signed an order also that has a no excuses provision in
5 it, and that your failures in discovery are your
6 failures, and theirs are theirs, and the failure of one
7 party doesn't excuse compliance by the other party. So
8 if that argument that y'all have been making seems to be
9 falling on deaf ears a little bit is because I know that
10 I've signed an order that dispatches it, okay?

11 MR. PARKER: Yeah, and I'm not -- I don't
12 think I'm trying to make that argument here, Your Honor.

13 THE COURT: No, I understand. I'm just
14 trying to -- I'm trying to explain to you what my
15 position is about discovery transgressions.

16 MR. PARKER: Yes, sir.

17 THE COURT: And so -- I mean, I'm -- so when
18 you say that these were newly accused and we couldn't
19 have provided discovery on them, I disagree with that,
20 and that's why I interrupted you, okay?

21 MR. PARKER: Yes, sir. In any event, the
22 newly-accused drives, we did provide to them the source
23 code on March 17th of '09, and if you flip to the very
24 next one, on March 23rd of '09, we provided them
25 narratives that related to the newly-accused drives. So

1 as late as March 23rd of '09, they had -- or as early as
2 March 23rd of '09, they had all of this, all of this,
3 and it was not until last week that now Mr. Howe
4 realizing -- and I know they realize now because of our
5 motion to strike their infringement contentions. Their
6 infringement contentions do not in any way comply with
7 the local rules because they haven't done, even through
8 the third amended infringement contentions that this
9 Court permitted them to file, they haven't done what
10 they are now attempting to do and what they were ordered
11 to do a long time ago and what they've had the
12 capability to do in most cases for months, if not more
13 than a year, and have refused to do until after the
14 jury's struck and on the eve of trial.

15 And our position is we are substantially
16 prejudiced by them waiting to this late date after the
17 jury is struck to finally provide on a drive-by-drive
18 basis source code references that they could have
19 provided with respect to all of these drives months ago
20 and with respect even to the newly accused ones as early
21 as at least April of this year.

22 Now, we took Dr. Howe's continued
23 deposition, if you will, and he admitted during that
24 recent deposition that the source code and deposition of
25 QSI's witness in August of 2008 were available to him,

1 and he could have included that information in his
2 report, but he did not. He made the choice not to do
3 so. In fact, he agreed that all but three of the drives
4 now accused, those are the newly-accused drives in the
5 litigation, were disclosed back in August of 2008.

6 And he -- Dr. Howe informed us at his
7 recent -- at his recent deposition that he never even
8 received the source code provided by QSI on March the
9 17th, and on April 7th, 2009, Dr. Howe submits a
10 supplemental expert report finally citing to source code
11 that he has had available to him from almost the
12 beginning of this litigation. We are -- and available
13 to them, Your Honor, in the format that they requested
14 and that their technical expert went and obtained.

15 Now, I understand that there have been
16 accused discovery transgressions on both sides of this
17 case from the beginning. I haven't been managing this
18 case from the beginning, and I might have managed it
19 differently had I been doing so, but I have now had the
20 chance and I was at a little bit of a disadvantage when
21 we were here for the last hearing, I now have had a
22 chance to educate myself fully on what we've done.

23 And, frankly, Your Honor, while we might
24 have done some things more quickly and we might have
25 done some things more differently, it is absolutely

1 unfair and it is absolutely litigation by ambush for
2 them to come up at this late date, even after his
3 subsequent deposition, and prevent -- and present,
4 rather, a supplemental report by their expert and seek
5 to have this Court approve a fourth set of infringement
6 contentions two weeks before trial, two weeks after the
7 jury is selected.

8 It's absolutely inappropriate, and it is no
9 way we aren't substantially prejudiced by having to
10 proceed on that basis. There is no way with the time
11 left we can have an expert prepared to respond to this
12 or to deal with this, Your Honor. This is the ultimate
13 in terms of an ambush as far as we're concerned in this
14 case, and it should not -- absolutely should not be
15 permitted.

16 If you look at when the vast majority of the
17 source code, everything except for the three unaccused
18 drives, was provided 21 months ago, and the new
19 supplemental -- the fourth supplemental infringement
20 contentions, and that is sought to be filed or is filed
21 on June the 12th of '09.

22 And, Your Honor, I know that they have not
23 yet responded to our motion to strike their third
24 amended infringement contentions. That is a motion
25 that's based on the fact that they don't meet the local

1 rules, and they clearly don't. It's not until their
2 fourth amended, the ones that they are now asking the
3 Court to permit to come in, that they have even made an
4 effort to meet the local rules.

5 And they're going to -- there's one more
6 thing I want to point out, Your Honor, and this is maybe
7 the most egregious move of all. In taking our technical
8 expert's deposition -- and I can -- I can get you the
9 numbers, or I can get somebody to pull the numbers for
10 me. In taking our technical expert's deposition, in an
11 effort to try to come in here and I think today or at
12 some point argue that this is somehow new, they showed
13 him exhibits and they showed him and they -- and they
14 apply -- they put new numbers on those exhibits. I
15 don't want to misstate here. I want to get it precisely
16 right.

17 Katherine, do you have that --

18 MS. MURRAY: Yes.

19 MR. PARKER: -- because I want to give the
20 corresponding -- as an example, on the May 28th and
21 29th, where are they? Okay.

22 on May 28th and 29th, they took, per the
23 Court's permission from our last hearing, our technical
24 expert for I believe it was an additional 10 hours over
25 two days. They marked an Exhibit 78 as this proposed

1 new exhibit, but it was Exhibit 3 from the same man's
2 deposition a year ago, more than a year ago. They had
3 an Exhibit 7, and Exhibit 86 is the same as Exhibit --
4 they had a new Exhibit 86. It is the same as Exhibit
5 29. A new Exhibit 74 is the same as Exhibit 47. A new
6 Exhibit 70 is the same as -- Exhibit 70 is the same as
7 Exhibit 42, and Exhibit 80 is the same as Exhibit 50.

8 In other words, in an effort, I think, to
9 try to argue that there's something new here, they
10 remarked as supposedly new exhibits to our in-house
11 technical guy's deposition the very same exhibits that
12 they had used with him before, and there's something
13 inappropriate about doing that and then trying to come
14 to this Court and argue that it's only because they got
15 this better availability to the source code since the
16 hearing in May that they are now able to provide these
17 infringement contentions.

18 First of all, that was offered as early as
19 '07. It was their choice not to look -- it was their
20 choice to get it in a format they got it in then. They
21 didn't ever ask for it again except this one mention in
22 a deposition approximately 13 months later that wasn't
23 followed up on at all. When they brought it back up
24 again in May, we made it available again but to amend
25 the infringement contentions now and to change the

1 expert report now to include the source code is just
2 absolutely an ambush and should not be permitted, Your
3 Honor.

4 THE COURT: Mr. Sankey, I know you hadn't
5 had a chance to file a written response, and you don't
6 have to orally respond at this time unless you want to,
7 so --

8 MR. SANKEY: Your Honor, and that's what I
9 was going to tell the Court, is I obviously am not
10 intimately involved in this.

11 THE COURT: And I'm not -- I understand he
12 wants -- he's making his argument, but I'm -- I'm going
13 to allow everybody adequate opportunity to respond.

14 So if you want to defer any argument,
15 I'll -- I'll reconvene another session if you want to
16 orally argue.

17 MR. SANKEY: What I would like to do, Your
18 Honor, we will be filing that response later today I
19 believe is our deadline.

20 THE COURT: Okay.

21 MR. SANKEY: But I'd like to just make a few
22 general comments from my personal knowledge and then let
23 one of the technical expert attorneys respond once the
24 Court has all the briefing in.

25 THE COURT: Before I forget, too, can y'all

1 tender to my chambers a copy -- complete copy of both of
2 your in-house persons' depositions, both the initial one
3 and then with those exhibits on it and the continuation
4 that I ordered with the new exhibits?

5 MR. PARKER: Yes, sir.

6 THE COURT: Okay. I need that. And I also
7 need -- that's it. I'll call on you if I need anything
8 else.

9 MR. PARKER: Yes, sir.

10 THE COURT: Just before I forget that, I
11 want to see the entire depositions.

12 MR. PARKER: We will do that.

13 MR. SANKEY: Briefly, Your Honor, my general
14 comments would be this with respect to these charts and
15 the stars, with respect to the source code provided in
16 October of 2007, there was a deposition taken of their
17 deponent that I think now will be given to the Court in
18 August 2008 where their own witness says, looking at the
19 course code that we have provided to you, I can't tell
20 you how our products work.

21 It was at that same deposition that we had
22 requested and said, "We will take advantage of your
23 offer to provide us with this computer that has a reader
24 on it so we can read the source code." A different
25 attorney from their side present added -- said, "I'm

1 not -- I don't understand what the agreement was. I
2 don't understand what you want." Didn't give it to us.

3 The red stars on the narrative that they
4 finally provided to the interrogatory answers based upon
5 an order from the Court, same thing. Three or four
6 hundred pages of a narrative given to their witness and
7 saying, "Okay. Now with the source code you've given us
8 with the narrative that you've given us, tell us how
9 your products work."

10 "Sorry, we can't do it."

11 Still not able to do it. At the last
12 hearing, I think the Court heard the arguments about the
13 computer reader and the misunderstanding between the
14 parties and why it had never been provided. The Court
15 ordered that be produced 48 hours before the deposition.

16 Mr. Howe and Mr. Trop went to L.A. on
17 Memorial Day. They looked at it on Tuesday and
18 Wednesday, were able for the first time to read that
19 source code based upon that reader to the detail that
20 they needed with respect to the specific drives. Mr.
21 Howe was deposed then on the following Thursday and
22 Friday on those issues.

23 THE COURT: Well, not Mr. Howe, though, was
24 it? Is that --

25 MR. SANKEY: I'm sorry, their expert.

1 THE COURT: Okay.

2 MR. SANKEY: After Mr. Howe had had an
3 opportunity to -- to review that for the first time.

4 The only other general comment that I'll
5 make that -- is that with respect that there's something
6 nefarious or -- going on with, you know, renaming
7 exhibits something different, I don't think there's an
8 argument that we're changing the number on the exhibit
9 and now saying that this is first time we've ever had
10 that exhibit. I just -- I don't think that's the case.

11 But with those general comments, I will rely
12 upon what we file this afternoon and any arguments from
13 the experts that have been intimately involved in this
14 issue.

15 THE COURT: Well, I need -- and if you need
16 another day to make your filing, that's okay, but I want
17 to know what all interaction occurred, what conferencing
18 occurred as far as getting the source code on the
19 stand-alone computer that y'all requested at the
20 deposition. I need to know what all efforts were made
21 by, you know, your view by both sides from August or
22 September of 2008 when y'all were in this deposition out
23 here until I ordered it to be produced the last time we
24 were here, because the meeting and conferring in this
25 case has been dismally poor since before I had the

1 scheduling conference, and I commented on it then, and,
2 you know, I want to know with sworn testimony or
3 affidavits what all happened.

4 And I'll -- and, obviously, the Quanta
5 defendants can introduce me to their view on that, as
6 well, but, you know, I commented on it at the scheduling
7 conference that the rules require you to meet and
8 confer, that y'all didn't know how to meet and confer,
9 y'all had a dispute over how to do that, and that's how
10 the case got kicked off, and that's how it's been ever
11 since, and it's going to trial on the 30th in some form
12 or fashion, so we'll -- I'll let you respond to that --

13 MR. SANKEY: Okay. One more comment --

14 THE COURT: -- as best you can.

15 MR. SANKEY: -- while I'm thinking of it,
16 Your Honor, that I wanted to respond to with respect to
17 their expert and having -- him having an ability to
18 review the fourth supplemental and respond to it.

19 It's my understanding, and, again, from what
20 I'm told from my colleagues, that their expert is not
21 going through the source code and the reader in the --
22 in their narrative explanation and testifying as to how
23 their products operate. He's not doing that, so I don't
24 know that -- how he's prejudiced.

25 THE COURT: Of course, their argument is

1 going to be they wouldn't have to do that because y'all
2 haven't identified the source code modules until -- I
3 mean, that's --

4 MR. PARKER: You took the words right out of
5 my mouth, Your Honor.

6 THE COURT: That's --

7 MR. PARKER: That's what I was going to say.

8 THE COURT: Like I said, y'all got a jury in
9 the box, it's going to trial on the 30th, and I will do
10 my level best to put it in a position that it needs to
11 be in given the position y'all have put it in. So I'll
12 just leave it at that, and I'll sign whatever orders I
13 need to sign to get it there.

14 MR. SANKEY: Yes, Your Honor.

15 THE COURT: Okay?

16 MR. SANKEY: Thank you, Judge.

17 THE COURT: What else? Anything else from
18 the plaintiff that we can do today?

19 MR. SANKEY: Your Honor, the only other
20 thing that we've put in our letter, I think the parties
21 were going to ask the Court for the procedure with
22 respect to the inequitable conduct portion. Would that
23 occur directly after or two weeks later or --

24 THE COURT: You did say that in your letter,
25 and I don't have an answer for you, but I'll -- how much

1 time you think that case is going to take to put on?

2 MR. PARKER: One day. I'm not -- Mr. Platt
3 is going to do that, so I have to --

4 THE COURT: That's okay. Your estimate at
5 this time is it would take -- you can have it done in a
6 day, then, Mr. Platt?

7 MR. PLATT: That's correct, Your Honor.

8 THE COURT: Okay. I don't know whether
9 he'll want to start it right as soon as the jury gets
10 the case or if he'd want to bring y'all back a couple
11 weeks later and schedule a time.

12 He may want to have you do some trial briefs
13 between -- from the time the case gets submitted to the
14 jury and the time you start. He's done that in the past
15 on his inequitable conduct cases, but you did tell me
16 that in the letter. I don't have an answer for you,
17 though, and I'll get you one as quickly as you can, all
18 right?

19 MR. SANKEY: Nothing else from the
20 plaintiff.

21 THE COURT: I'll try to get you one this
22 week, okay?

23 MR. PARKER: One thing we did discuss last
24 time, Your Honor, and you said you were going to take it
25 under consideration was the issue of potential

1 additional time related to the fact that interpreters
2 are going to be used.

3 THE COURT: I think you're going to get an
4 additional three hours, and I have raised that with the
5 trial judge, but I don't have a -- I don't want to
6 warrant that to you yet --

7 MR. PARKER: Yes, sir. Yes, sir.

8 THE COURT: -- okay? But I have raised it
9 with him. He knows that it's an issue. And I'll get
10 you -- I'll get you something on that today formally,
11 okay?

12 MR. PARKER: Yes, sir.

13 THE COURT: He is -- let me -- he is out of
14 state today. I'll get you something as quickly as I
15 can, but before -- I think before the close of the week
16 for sure, okay?

17 MR. PARKER: Understood. Understood.

18 THE COURT: All right. Is that it?

19 MR. PARKER: Yes, sir.

20 MR. SANKEY: Yes, sir.

21 THE COURT: All right. Again, I appreciate
22 the -- the agreements that y'all have made on your
23 exhibits. If y'all want to start working on your lists,
24 I've carried a few things, and I'll get you rulings. If
25 you just want to indicate on your lists that you're

1 submitting to me that you've carried -- or that the
2 Court has carried, you know, the objections to those
3 exhibits, if you want to put it in an order form that
4 just said, you know, The following were -- exhibits were
5 admitted without objection, the following objections
6 were made and overruled by the Court to these exhibits
7 and they're admitted, and these were sustained, and
8 these exhibits are excluded, then I'll sign that so
9 you'll know before you -- you can use your exhibits,
10 then, that are in evidence in opening statement, okay?

11 MR. PARKER: Yes, sir.

12 THE COURT: All right. Thank y'all.

13 COURT SECURITY OFFICER: All rise.

14 (Recess.)

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1 CERTIFICATION

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3 I HEREBY CERTIFY that the foregoing is a
4 true and correct transcript from the stenographic notes
5 of the proceedings in the above-entitled matter to the
6 best of my ability.

7

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SHELLY HOLMES	Date
Deputy Official Reporter	
State of Texas No.: 7804	
Expiration Date: 12/31/10	

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